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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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RAUL DOMINGUEZ,

97 CV 5162

Petitioner,

MEMORANDUM

-against-

AND  
ORDER

ROBERT H. KUHLMANN,

Respondent.

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RAUL DOMINGUEZ  
94-A-4446  
Sullivan Correctional Facility  
P.O. Box A.G.  
Fallsburg, NY 12733-0116  
plaintiff pro se.

RICHARD BROWN, ESQ.  
District Attorney, Queens County  
(Robin Forshaw, of counsel)  
125-01 Queens Boulevard  
Kew Gardens, New York 11415  
for respondent.

NICKERSON, District Judge:

On September 2, 1997, petitioner pro se brought  
this proceeding for a writ of habeas corpus challenging  
his conviction pursuant to 28 U.S.C. § 2254.

On May 9, 1990 petitioner was beaten in a fight with Raul Hernandez. Petitioner left the scene of the fight, returned a short time later with a loaded gun, and shot and killed Hernandez.

At trial petitioner asked that the court charge the affirmative defense of extreme emotional disturbance, which would reduce the crime from Murder in the Second Degree to Manslaughter in the First Degree. That request was denied.

Petitioner was convicted in Supreme Court, Queens County, of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. On June 3, 1994 he was sentenced to concurrent indeterminate prison terms of from twenty years to life for murder and five to fifteen years for weapon possession.

With the assistance of appointed counsel, petitioner appealed his conviction to the Appellate Division, Second Department. Petitioner claimed that he was denied due process by the trial court's refusal to charge the affirmative defense of extreme emotional disturbance or the lesser included offense of first-

degree manslaughter. He also argued that because defendant claimed he used force in self-defense, the trial court should have instructed the jury that to find him guilty the evidence must show that the death was caused by his use of excessive, unjustified deadly physical force, and that the sentence imposed on him was excessive.

By decision dated April 1, 1996, the Appellate Division affirmed the conviction. People v. Dominguez, 630 N.Y.S.2d 583 (2d Dep't 1996). The court noted that there was insufficient evidence for the jury to find, by a preponderance of the evidence, the elements of extreme emotional disturbance.

On June 18, 1995, and again on August 15, 1996, petitioner sought permission to appeal to the New York Court of Appeals. He asked that the court review his claim that the trial court erred in refusing to charge the jury on extreme emotional disturbance. The application was denied on December 26, 1996. People v. Dominguez, 89 N.Y.2d 291, 654 N.Y.S.2d 723 (1996).

Petitioner filed a petition for writ of habeas corpus in this Court on September 2, 1997, raising the claim that he was denied due process by the trial court's failure to instruct the jury concerning extreme emotional disturbance.

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The Antiterrorism and Effective Death Penalty Act (the Act), Pub. L. No. 104-132, 110 Stat. 1214, 1220 (1996), provides that a state prisoner's application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless that adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." 28 U.S.C. § 2254(d)(1).

Petitioner argues that the trial court's refusal to instruct the jury that the defendant acted under the influence of an extreme emotional disturbance violates due process. Under New York law, the affirmative defense of extreme emotional disturbance allows a defendant to show reduced culpability for a homicide because of the influence of emotional trauma, reducing the crime from second-degree murder to first-degree manslaughter. N.Y. Penal Law §§ 125.20(2), 125.25(1)(a).

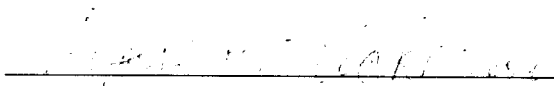
Petitioner cites a series of New York state cases in support of the proposition that an instruction about the lesser-included offense should have been given. But the Appellate Division found that there was insufficient evidence to justify such a charge. In any event, petitioner does not point to any Supreme Court case showing that he was entitled to this instruction. Indeed, the Supreme Court has expressly declined to decide whether, in a non-capital case, the failure to instruct on a lesser-included offense violates the Constitution. See Beck v. Alabama, 447 U.S. 625, 637--

38 n. 14 (1980); see also, Knapp v. Lombardo, 46 F.3d 170, 179 (2d Cir. 1995). Petitioner consequently cannot show that the state court's rejection of his claim was contrary to, or an unreasonable application of, existing Supreme Court precedent.

The petition is denied. A certificate of appealability will not be issued because petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253; see Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996).

So ordered.

Dated: Brooklyn, New York  
June 4, 1998

  
Eugene H. Nickerson, U.S.D.J.